LAI CHU SING v. LAI TECK SIAN & ORS

HIGH COURT MALAYA, MELAKA
MOHD FIRUZ JAFFRIL JC
[CIVIL SUIT NO: 22NCVC-32-5-2014]
25 MAY 2016

COMPANY LAW: *Shares – Transaction of shares – Obtaining financial assistance from company for purposes of acquiring shares – Whether contravened s. 67(1) of Companies Act 1965 – Whether share sale transaction separate and distinct from loan transaction – Whether share sale transaction valid and enforceable – Whether plaintiff entitled to claim for balance of actual market value for his shares*

The plaintiff and the first defendant were brothers. Prior to the sale of the plaintiff's shares sometime in March 2012, both were shareholders in the third defendant ('the company') wherein each of them owned and held 500,000 shares each. The plaintiff was the chairman and director of the company whilst the first defendant was the managing director. The first defendant had since 1994 devised some succession plan insofar as the management and operation of the company was concerned, which involved one party exiting the company and the other party assuming full control of the company by way of sale and/transfer of shares of the other shareholder. However, no succession plan took place until the company successfully sold off three of its properties and the defendants received a net sum of approximately RM6 million from the same. Subsequently, the first defendant prepared a rough estimation as to the assets and liabilities of the third defendant. Having valued the company at RM15 million, the first defendant proposed for either the plaintiff or himself to exit the company and as consideration, the party exiting the company would be paid a sum of RM7.5 million for their 500,000 shares. The plaintiff finally agreed to accept a further sum of RM500,000 to exit the company at RM8 million. Both the plaintiff and the first defendant signed a resolution allowing the first defendant to borrow RM8 million from the company. A resolution appointing the second defendant and PW3 as directors of the company were also signed by both the plaintiff and the first defendant. The company then issued two cheques amounting to RM8 million. The plaintiff thus tendered his resignation. Thereafter, the company declared a dividend amounting to RM8.5 million which were apportioned equally between the first and second defendants and subsequently used to set off the loan of RM8 million taken by the first defendant from the company. The plaintiff issued two notices of demand wherein the plaintiff demanded for the return of his 500,000 shares and his re-instatement as a director of the company within 14 days from the date of receipt of the notice. The plaintiff claimed that the RM8 million that was paid to him was only an initial payment and that the final figure for the

A 500,000 shares was subject to audited accounts of the company's assets and liabilities. The defendant, on the other hand, counterclaimed for the return of the RM8 million received by the plaintiff in the event the court found the share sale transaction null and void. The issues that arose were (i) whether the shares sale transaction between the plaintiff and the first and
B second defendants were valid and enforceable in law; and (ii) if the transaction was valid, whether the plaintiff was entitled to claim from the first and second defendants the balance of the actual market value for the plaintiff's 500,000 shares purchased by the first and second defendants as at 31 March 2012 less than the RM8 million initial payment received by the
C plaintiff.

Held (dismissing plaintiff's claim with costs; dismissing defendants' counterclaim):

(1) The plaintiff submitted that the first defendant had obtained financial assistance from the company for purposes of acquiring shares in the
D company, which clearly contravened s. 67(1) of the Companies Act 1965 ('CA'). The prohibition laid down in s. 67 involved two ingredients (i) there must be financial assistance given by the company, which may be given 'directly or indirectly' and includes a loan, guarantee, pledged for security; and (ii) the financial assistance given is
E 'for the purpose of or in connection with' the purchase of the company's shares'. For purposes of determining whether or not there was any financial assistance given in contravention of s. 67, the courts have more often than not looked at the commercial aspects of each transaction separately instead of taking a narrow stand on the subject matter
F concerned. (paras 31, 36 & 37)

(2) The share sale transaction herein was separate and distinct from the loan transaction of RM8 million to the first defendant. It is the loan transaction which was prohibited by virtue of s. 67(1) of the CA and not the acquisition of the shares in the company. The share sale transaction
G herein was valid and enforceable despite there being a contravention of s. 67 of the Companies Act 1965 by both the plaintiff and the first defendant. (paras 49 & 50)

(3) As to the loan of RM8 million to the first defendant, it was up to the company as to what it decided to do as s. 67(6) of the CA does allow
H so. The plaintiff who was no longer a director or shareholder of the company had no *locus standi* to initiate any action on it. Furthermore, the plaintiff had duly submitted that since the company had declared a dividend of RM8 million, there was no loss to the company arising from the transaction. This was the mischief intended to be proscribed by s.
I 67. From the company entity's point of view, the net effect to issuing a loan for RM8 million to its shareholders to be set off subsequently by

a declaration of dividends, or to immediately declare and issue dividends of RM8 million has little difference. In fact, rather than be entangled in a shareholders dispute leading to its ultimate demise as has oft happened, the implementation of the transaction between its two shareholders had indeed allowed a smooth transition and thus continuity of the operation of the company. (para 53)

(4) The plaintiff's cause of action in asking this court to declare the sale transaction void was akin to asking this court to enforce a transaction, founded on an illegal act due to the fact that the 500,000 shares purchased from the plaintiff was paid *via* monies obtained from an illegal loan transaction. It is trite law that a cause of action which is founded on an illegal act cannot succeed. (paras 54 & 55)

(5) The contemporaneous documents on the transfer of the shares clearly operated against the plaintiff. Looking at the notices of demand itself as well as the replies and responses by the plaintiff, with the first notice on seeking a discharge of the plaintiff as guarantor for some of the loans taken by the company as well as on the contravention of s. 67 of the CA. It was difficult not to conclude that the issue of the plaintiff seeking for a revaluation was an afterthought. Further, the plaintiff's plea of *non est factum* did not affect the validity of the documents that he had signed. (para 29)

Case(s) referred to:

Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No 2) [1980] 1 All ER 393 CA ***(refd)***

Carney v. Herbert [1985] All ER 438 ***(refd)***

Charterhouse Investment Trust Ltd v. Tempest Diesels Ltd [1986] BCLC 1 ***(refd)***

Chettiar v. Chettiar [1962] 1 All ER 494 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Daniel D William v. Luhat Wan & Ors & Another Case (2) [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762 HC ***(refd)***

Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron [2009] 10 CLJ 95 HC ***(refd)***

Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(foll)***

Fujasa Property Sdn Bhd & Anor v. Idaman Unggul Bhd & Anor [2015] 6 CLJ 705 CA ***(refd)***

Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors [2000] 3 CLJ 341 CA ***(refd)***

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors [1990] 1 LNS 172 SC ***(refd)***

Maybank Islamic Bhd v. M-10 Builders Sdn Bhd & Anor [2015] 4 CLJ 526 HC ***(refd)***

Neo Tai Kim v. Foo Stie Wah [1981] 1 LNS 153 CA ***(refd)***

RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 3 CLJ 661 HC ***(refd)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***

Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724 ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***

A *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors [1999] 1 LNS 14 HC* ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***
Tan Chor Thing v. Tokyo Investment Pte Ltd & Anor [1991] 2 CLJ 1059; [1991] 4 CLJ (Rep) 1122 HC ***(refd)***
B *The Co-Operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC* ***(foll)***
Tinsley v. Milligan [1993] 3 All ER 65 ***(refd)***
Tokyo Investment Pte Ltd & Anor v. Tan Chor Thing [1993] 3 SLR 170 ***(refd)***

Legislation referred to:
C Companies Act 1965, s. 67(1), (2)(a), (b), (c), (3), (6)
Contracts Act 1950, ss. 24, 66
Evidence Act 1950, ss. 91, 92, 101

For the plaintiff - Anthony Louis Taye, Yau Her Lerk & Mae Taye; M/s Taye & Co
For the defendant - Khairil Aznan Azizi & Shamini Devi Dorasamy; M/s Andrew TS Goh & Khairil
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Reported by Suhainah Wahiduddin

JUDGMENT

E **Mohd Firuz Jaffril JC:**

[1] This is the decision of the court in respect of the plaintiff's claim and the defendants' counterclaim at the end of a full trial involving a total of ten witnesses (five for the plaintiff and five for the defendants).

F **Brief Facts**

[2] The plaintiff and the first defendant are brothers. Prior to the sale of the plaintiff's shares sometime in March 2012, both were shareholders of the third defendant (hereinafter referred to as "the company") wherein each of them owned and held 500,000 shares each.

G **[3]** The plaintiff was the chairman and director of the company whilst the first defendant was the Managing Director. His wife and two daughters were also employees of the company. The second defendant is the wife of the first defendant.

[4] Based on the evidence adduced at the trial, it was apparent that the first
H defendant had since 1994 devised some succession plan insofar as the management and operation of the company is concerned. The succession plan involved one party exiting the company and the other party assuming full control of the company by way of sale and/transfer of shares of the other shareholder (see exh. P16). Similarly, based on the unchallenged evidence of
I SD3, the plaintiff also wanted to exit the company if the terms were favourable to him.

[5] However, no succession plan ever took place until the company successfully sold off three of its properties to San Miguel Yamamura Wovern Products Sdn Bhd and the defendants received a net sum of approximately RM6 million from the same.

[6] Thereafter, the plaintiff proposed to the first defendant that the company use the proceeds of the sale to declare dividends. The first defendant on the other hand, counter proposed for the proceeds of the sale to be used towards the succession plan.

[7] Subsequently, the first defendant prepared a rough estimation as to the assets and liabilities of the third defendant (see exh. P14). Having valued the company at RM15 million, the first defendant sought assistance from his sister, DW-3 and her husband, DW-4 to act as intermediaries to convey his proposal to the plaintiff.

[8] In essence, the first defendant's proposal was for either the plaintiff or himself to exit the company. As consideration, the party exiting the company will be paid a sum of RM7.5 million for their 500,000 shares.

[9] Sometime in early March 2012, both DW-3 and DW-4 went to the plaintiff's house and conveyed the proposal of the first defendant to the plaintiff in the presence of the plaintiff's wife, PW-5. At that point in time, the plaintiff did not communicate as to whether he was accepting or rejecting the proposal.

[10] Subsequently, the plaintiff met DW-3 and informed her that he wanted to exit the company but at RM7.5 million, he was half-hearted. Yet the plaintiff still did not indicate as to whether he was accepting or rejecting the proposal.

[11] A few days later, the plaintiff called DW-3 requesting for DW-4 to accompany him to check stocks and machineries (reason being, DW-4 runs a similar business with that of the company). DW-4 acceded to the plaintiff's request. The inspection then proceeded at the company's premise in the presence of the plaintiff, PW-3 and DW-4.

[12] Despite the inspection of the stocks and machineries, the plaintiff still did not revert on the proposal. This prompted DW-3 to contact the plaintiff. She telephoned him and asked whether he would agree to accept a further sum of RM500,000 making the offer to exit the company at RM8 million. DW-3 confirmed that the plaintiff agreed to sell his shares at RM8 million.

[13] Thereafter, DW-3 contacted the first defendant informing that the plaintiff had agreed to sell his shares in the company for RM8 million. The first defendant agreed to the price of RM8 million.

A **[14]** On 19 March 2012, both the plaintiff and the first defendant signed a resolution allowing the first defendant to borrow RM8 million from the company. This resolution was prepared by the company secretary upon instructions of the first defendant.

B **[15]** On 23 December 2012, both the plaintiff and the first defendant signed a resolution at the company secretary's office appointing the second defendant and PW-3 as directors of the company.

[16] Subsequently, the company issued two cheques amounting to RM8 million (RM2 million and RM6 million respectively) dated 26 March 2012 and 28 March 2012 to the first defendant.

C **[17]** On 29 March 2012, the plaintiff tendered his resignation (exh. D-19) which was witnessed by PW-3. This was at the company secretary's office. During the same occasion, the plaintiff also signed the following documents:

confirmation of consideration for shares transfer (exhibit D-20):

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(i) Form 32A of the Companies Regulations 1966 being the share transfer form (exh. D-21);

(ii) director's resolution accepting the plaintiff's resignation as a director of the company (exh. D-46); and

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(iii) a director's resolution to confirm the transfer of shares from the plaintiff to the second defendant (exh. D-33).

[18] Insofar as payment of the RM8 million to the plaintiff concerned, he received payment as follows:

F Cheque for RM1 million dated 29 March 2012:

(i) cheque for RM1 million dated 29 March 2012; and

(ii) six cheques for RM1 million (each dated 31 March 2012).

G **[19]** It is important to note that the first defendant had at all material times admitted that he had advanced RM8 million loan which he borrowed from the company to the second defendant, to enable her to purchase the plaintiff's shares.

H **[20]** In April-May 2012, the company declared a dividend amounting to RM8.5 million. The dividends were apportioned equally between the first and second defendants and subsequently used to set off the loan of RM8 million taken by the first defendant from the company.

I **[21]** The plaintiff's solicitors issued two notices of demand dated 10 April 2014 wherein the plaintiff demanded for the return of his 500,000 shares and his re-instatement as a director of the company within 14 days from the date of receipt of the notice. The first and second defendants replied to the said

notice *via* their solicitors letter dated 25 April 2014. The plaintiff's solicitors then replied by way of a letter dated 6 May 2014. It was only in this reply that the plaintiff claimed that the RM8 million that was paid to him was only an initial payment and that the final figure for the 500,000 shares is subject to audited accounts of the company's assets and liabilities as of 31 March 2012.

Issues For Trial

[22] Whilst the issues for trial are contained in Bundle F, during the course of the hearing before me, it was agreed that the trial should proceed to determine the following issues without going into the quantum of the claim:

(i) whether the shares sale transaction between the plaintiff and the first and second defendants is valid and enforceable in law?; and

(ii) if the transaction is valid, is the plaintiff entitled to claim from the first and second defendants the balance of the actual market value for the plaintiff's 500,000 shares purchased by the first and second defendants as at 31 March 2012 less the RM8 million initial payment received by the plaintiff?

[23] Counsels for both the plaintiff and the defendants agreed that in the event this court finds that the transaction is invalid, null and void, there is no necessity for me to decide on the second issue. However, if the transaction is found to be valid, I will have to decide as to whether the plaintiff had successfully proven that sale of the plaintiff's 500,000 shares were on actual market value of the shares as at 31 March 2012.

[24] Notwithstanding the agreement by both parties as stated in para. 22 above, I propose to deal with the second issue first.

Whether The Plaintiff Had Successfully Proven That The Sale Of The Plaintiff's 500,000 Shares Was On Actual Market Value Of The Shares As At 31 March 2012 And That The Payment Of RM8 Million Was Only As An Initial Payment?

[25] The plaintiff's submission on this issue is as follows:

(i) the testimony of the plaintiff (PW4) clearly shows that he did not agree to the offer of RM8 million for his 500,000 shares in the company;

(ii) this issue cannot be concluded merely based on the resolutions and documents as the plaintiff cannot understand the English language, what more read and understand them. The company secretary (DW2) did not explain the contents of these documents to him;

(iii) there is no basis for any reasonable person including the plaintiff to agree to only an estimate of the value of the company's assets as the basis to value the plaintiff's shares;

A (iv) it was not the plaintiff who wanted to cash out his shares and exit from the third defendant but it was the first defendant's idea all this while for him to do so;

(v) exhibit P-14 is an unsubstantiated estimate of the third defendant's assets written on a piece of paper and purely an assumption of what
B the company is worth;

(vi) plaintiff did in fact take steps to value the real worth of the company by inspecting the machineries and stock. The plaintiff also requested for the details of the company's bank accounts even in November 2013;
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(vii) that the first defendant had motive and devised a scheme to defraud the plaintiff;

(viii) Sections 91 and 92 of the Evidence Act 1950 is not applicable for purposes of rebutting the plaintiff's oral evidence regarding exhs. D-
D 20 and D-21;

(ix) that this issue is not an afterthought as it was raised in the plaintiff's notice of demand ("NOD") after the defendant's reply dated 25 April 2014 to the plaintiff's first NOD, wherein the defendant rejected the plaintiff's contention that the sale and purchase and transfer of his
E 500,000 shares in the company which was paid by the loan given by the company was contrary to the provisions of the Companies Act 1965; and

(x) the second NOD is also not an afterthought because the notice was merely to notify the defendants of the impending suit. As such whether
F its contents is accurate or otherwise is irrelevant as the accuracy of the plaintiff's claim becomes only material when the writ and statement of claim is filed by him.

[26] In response, the defendant submitted that:

G (i) the plaintiff's purported illiteracy in the English language seems to have been self rebutted during cross-examination wherein he was able to read and identify the sale and purchase agreement of the three properties belonging to the company to San Miguel (exh. D-34). Even if the plaintiff did not understand English, it does not affect the
H validity of those documents signed or make it less effective than the ones he understood;

(ii) the plaintiff's conduct in requesting that he be discharged as guarantor from certain debts owed by the company to creditors shows that he had actual knowledge of the affairs of the company and was not kept
I in the dark by the first defendant;

(iii) the testimonies of PW3, the first defendant, DW2 and DW3 confirmed that the plaintiff attended to the signing of the requisite documents on three different occasions at the company secretary's office. On two of the occasions, the plaintiff proceeded to have lunch with PW3 and the rest of the family members after having signed the documents;

(iv) payment in the sum of RM8 million *via* two cheques was released to the plaintiff;

(v) exhibit D-20, the confirmation of consideration for shares transfer, clearly showed that the consideration for the plaintiff's 500,000 shares in the company was RM8 million and nothing more;

(vi) exhibit D-21, the share transfer form also stated that the consideration for the plaintiff's 500,000 shares in the company was RM8 million. Adjudication on the share transfer was done and the stamp duty on the sale of RM8 million was duly paid (exh. D-40);

(vii) the testimony of DW3 and DW4 who are disinterested parties to the case also supports the defendant. DW3 confirmed that that deal for the plaintiff's 500,000 shares in the company was for RM8 million;

(viii) If the RM8 million was a mere deposit, there was no necessity for the first defendant to increase his initial offer of RM7.5 million to RM8 million;

(ix) the plaintiff's own testimony showed that he only told the first defendant about the revaluation in 2013 (despite initially saying that he told the first defendant about it in 2014). This conforms with DW3's testimony as her answer to Question 20 of WSD-3;

(x) whilst the plaintiff submitted that the second defendant was merely holding the 500,000 shares as the first defendant's nominee, this was not pleaded by the plaintiff. In any event, the second defendant denies that she was holding the shares on behalf of the first defendant. Relying on the decision in *Neo Tai Kim v. Foo Stie Wah* [1981] 1 LNS 153; [1982] 1 MLJ 170 which was referred to and adopted in *Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron* [2009] 10 CLJ 95; [2009] 8 MLJ 510, the defendant was of the view that the doctrine of presumption of advancement applies;

(xi) the plaintiff's testimony that the first defendant had undertaken to furnish the company's audited account as at 31 March 2012 to enable the assets and liabilities of the company to be assessed for purposes of arriving at a final price is unsubstantiated;

A (xii) the plaintiff through his solicitors sent notices of demand, both dated 10 April 2014 (as at pp. 23-26 of Bundle B), wherein he demanded from the first and second defendants the immediate return of his 500,000 shares and that he be re-instated as director of the company within 14 days from the date of the notice. The solicitors for the first and second defendants replied *via* their letter dated 25 April 2014 (as at pp. 27-28 of Bundle B) denying that the sale of shares transaction was void due to illegality. It was only in the plaintiff's solicitor reply dated 6 May 2014 did the plaintiff claim that the RM8 million paid received by the plaintiff was as initial payment and that the final figure would depend on the audited accounts as at 31 March 2014; and

(xiii) the evidence adduced by the defendants including that of the plaintiff on the issue of revaluation of the shares leads to an irresistible conclusion that the plaintiff sold his 500,000 shares in the company to the second defendant for a consideration of RM8 million only, nothing more and nothing less. The plaintiff's claim was an attempt to force the second defendant to pay more for the shares.

[27] At this juncture, the question before me is whether the plaintiff has succeeded in proving their claim as required under s. 101 of the Evidence Act 1950. The said provision states as follows:

> (1) Whoever desire any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> Illustrations
>
> (a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.
>
> A must prove that B has committed that crime.
>
> (b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.
>
> A must prove the existence of those facts.

[28] The burden for the plaintiff to prove his case does not shift on to the defendants (see *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA).

[29] I am of the considered view that the plaintiff did not succeed in proving his case on a balance of probabilities. My reasons for finding so are as follows:

(i) having heard the testimony of the plaintiff and observed his demeanor, I find that the plaintiff is not an ignorant a person as described in the plaintiff's submission. To my mind, he is a person who understands the order of business as well as what was going on in the company. This finding is not surprising as there was ample evidence to show that the plaintiff was running the business before the first defendant took charge of the family business;

(ii) this is also evident from the manner as to how the plaintiff dealt with the offer from the first defendant wherein instead of giving any answer to the first defendant's proposal, the plaintiff conducted an independent inspection on the stocks and machineries;

(iii) despite the plaintiff's submission that the plaintiff cannot read or write what more understand English, I clearly observed as to how well acquainted the plaintiff was with exh. D34, namely the sale and purchase agreement between the Company & San Miguel Yamamura Woven Product. In any event, I agree with the defendants' submission that the plaintiff's plea of *non est factum* does not affect the validity of the documents that he signed (see *RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 3 CLJ 661; [2001] 4 MLJ 86);

(iv) Despite the plaintiff's submission that the plaintiff did request for a revaluation of the company assets, it was in fact on two occasions when the plaintiff gave evidence that he made the request in 2014, when only later he corrected himself. During cross-examination, the plaintiff said, "Saya buat keputusan untuk taksir semula pada tahun 2014. Bukan ... tahun 2012". I had noted this fact in my notes. During re-examination, the plaintiff again said that he told the first defendant that he wanted to re-assess the shares in 2014. To my mind, if the revaluation was indeed requested by the plaintiff in 2012, the year 2012 would automatically be ingrained in his mind instead of the year 2014;

(v) despite the testimony of SD3, sister to both the plaintiff and the first defendant, saying that the plaintiff only approached her in 2013 to request for a revaluation, the plaintiff's counsel failed to challenge her testimony. Such a failure is detrimental to the plaintiff's case and works against the plaintiff's stand; and

(vi) last but not least, the contemporaneous documents on the transfer of the shares, clearly operated against the plaintiff. Looking at the notices of demand itself the replies and response by the plaintiff's solicitors, with the first notice on seeking a discharge of the plaintiff as guarantor for some of the loans taken by the company as well as on the contravention of s. 67 of the CA, I find it difficult not to conclude that the issue of the plaintiff seeking for a revaluation is an afterthought.

[30] Having said the above, I shall proceed to deal with the first issue:

Whether The Shares Sale Transaction Is Valid And Enforceable In Law?

[31] In summary, the plaintiff's submissions on this issue are as follows:

(i) for purposes of acquiring the plaintiff's shares, the first defendant took a loan of RM8 million from the company. This fact was not disputed by the first defendant;

(ii) the fact that the first defendant obtained financial assistance from the company for purposes of acquiring shares in the company, clearly contravened s. 67(1) of the Companies Act:

> Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with the purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

(iii) whilst it was never stated in the company's books that the loan taken by the first defendant from the company was for the purpose of acquiring the plaintiff's shares, it still amounts to financial assistance and is thus caught by s. 67(1);

(iv) due to the financial assistance obtained by the first defendant, the entire shares sale transaction is illegal, null and void and unenforceable;

(v) the loan also contravenes art. 5 of the company's articles of Association (see exh. D-41);

(vi) once the issue of illegality has been established, the principle that the court ought not to enforce an illegal contract, would be applicable (see *Maybank Islamic Bhd v. M-10 Builders Sdn Bhd & Anor* [2015] 4 CLJ 526);

(vii) the defendants cannot rely on s. 67(6) of the Companies Act to validate the transaction as it is a recourse to the company only in the event the company decides to recover the loan of RM8 million taken by the first defendant. Moreover, the company has not suffered any loss as the RM8 million loan has already been paid in full by the contra of the dividends declared, a fact which is also not in dispute;

(viii) the counterclaim by the second defendant for the return of the RM8 million received by the plaintiff, in the event the court finds the share sale transaction null and void is without basis as she has no knowledge

whatsoever regarding the transaction as well as the repayment of the RM8 million loan by way of the contra dividends as the scheme was contrived by the first defendant alone. In addition the loan was taken by the first defendant and not by the second defendant. If so, the proper claimant for the RM8 million should be the company, who chose not to do so;

(ix) even if the company chose to recover the RM8 million loan, it can only do so after the shares have been returned and parties revert to the original *status quo* prior to the share sale transaction;

(x) on account of the financial assistance obtained by the first defendant, the share sale transaction is illegal, null and void and unenforceable. Thus, the plaintiff's 500,000 shares should be returned to him;

(xi) the return of the 500,000 shares to the plaintiff would not tantamount to unjust enrichment as the company has been repaid by way of the contra dividends declared; and

(xii) section 66 of the Contracts Act 1950 which provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or the contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

is also not available to the first and second defendants because the illegality of the scheme was not discovered to be void, but was schemed from day one *via* the sale of the company's properties to San Miguel Yamamura Wovern Products Sdn Bhd.

[32] Given opportunity to put in further submissions, the plaintiff submitted as follows:

(i) that there are exceptions to the general rule that property transferred under an illegal contract cannot be recovered as held in the case of *Tan Chor Thing v. Tokyo Investment Pte Ltd & Anor* [1991] 2 CLJ 1059; [1991] 4 CLJ (Rep) 1122; [1991] 3 MLJ 87 which was affirmed by the Singapore Court of Appeal in *Tokyo Investment Pte Ltd & Anor v. Tan Chor Thing* [1993] 3 SLR 170:

  (a) If the plaintiff can establish that the illegal aspect of the contract was not disclosed to him;

  (b) The plaintiff was not in *pari delicto*; and

  (c) If there is a statutory provision allowing so.

(ii) as the RM8 million loan taken by the first defendant from the company was illegal, it means that the plaintiff did not receive any consideration for his 500,000 shares;

A (iii) in view of the fact that the defendants have admitted that the shares sale transaction is illegal, the shares must be restituted back to the plaintiff pursuant to s. 66 of the Contracts Act. The party may only seek restitution under the provision if they were unaware of the illegality;

(iv) there is no evidence to suggest that the plaintiff was aware that the B contract was illegal nor that he was in *pari delicto*;

(v) the plaintiff only discovered upon the illegality after consulting his lawyers who raised the matter in the first notice of demand; and

(vi) that being the case and to avoid any allegation of unjust enrichment on C the part of the plaintiff upon restitution of his 500,000 shares to him, the plaintiff prays that he be required to pay only the sum of RM3.75 million (ie RM8 million minus RM4.25 million) to the company or the first defendant as that sum can be regarded as part of the dividends declared to him by the company.

D **[33]** On the opposing hand, the defendants submitted as follows:

(i) the shares sale transaction is valid as it does not in any way contravene s. 24 of the Contracts Act as reproduced below:

> What considerations and objects are lawful and what are not
>
> E 24. The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> F (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an G agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

(ii) the defendant's concedes that the giving of the loan by the company to the first defendant did tantamount to granting of financial assistance as envisaged in s. 67(1) of the Companies Act;

H (iii) the granting of the RM8 million loan to the first defendant was approved by both the plaintiff and the first defendant with the knowledge that the loan will be used to pay off the plaintiff for his shares;

I (iv) relying on the following decisions, the defendant submitted that whilst the granting of the loan to the first defendant was in contravention of s. 67(1) of the Companies Act, s. 24 of the Contracts Act is not

applicable due to its exclusion by the saving clause in s. 67(6) of the Companies Act which allows for recovery under an illegal contract. See:

(a) *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421; [1997] 4 MLJ 329; and

(b) *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997;

(v) relying on the case of *Fujasa Property Sdn Bhd & Anor v. Idaman Unggul Bhd & Anor* [2015] 6 CLJ 705; [2015] 7 MLJ 892, where the Court of Appeal made a finding that although there was indeed a breach of s. 67, nevertheless the settlement and assignment agreement was saved by the provisions of s. 67(6) which excluded the application of s. 24 of the Contracts Act 1950. Despite the settlement and assignment agreement contravening s. 67(1), there was no civil consequences and the settlement and the assignment agreement was not rendered null and void;

(vi) what is prohibited under s. 67(1) of the CA was the giving of financial assistance and not the acquisition of the shares itself;

(vii) alternatively, if the transaction is tainted by illegality for breach of s. 67(1) CA, the maxim "*ex turpi causa non oritur actio*" applies whereby no action can arise from a dishonourable cause;

(viii) there was evidence to suggest that the plaintiff was indeed aware as to the purpose of the RM8 million loan utilised;

(ix) that being the case, the court should not aid the plaintiff who is seeking to annul the transaction. The plaintiff's action should be dismissed on account of illegality where the loss lies where it falls;

(x) in the event the court orders for the 500,000 shares to be returned to the plaintiff, the court should also order the plaintiff to refund the RM8 million he received as consideration for the shares. This is in line with s. 66 of the Contracts Act; and

(xi) the suggestion by the plaintiff that he only needs to refund RM3.75 million out of the RM8 million he received for the shares tantamount to allowing the plaintiff to be unjustly enriched by retaining RM4.25 million which is part of the total consideration of RM8 million to purchase the shares.

[34] In response to the plaintiff's further submission, the defendant replied as follows:

(i) even the court was of the view that there was a breach of s. 67(1) of the Companies Act, the share sale transaction was still valid as based on the cases of *Datuk Tan Teck Leng, Lori Malaysia and Fujasa* (*supra*),

A there are no civil consequences to the particular breach complained of. The defendant also relied on the Privy Council's decision in *Carney v. Herbert* [1985] All ER 438;

(ii) the first defendant was equally ignorant as the plaintiff in this case that s. 67(1) of the Companies Act prohibited the granting of financial B assistance for the purchase of the company shares;

(iii) the court ought to be mindful that the issue before the court in the present case is not for recovery of property where the contract is illegal or void. The plaintiff is moving this court to declare the share sale transaction void due to illegality. That being the case, can the C court aid a party to an illegal contract to annul it?;

(iv) the case of *Tan Chor Thing v Tokyo Investment Pte Ltd & Anor* (*supra*) relied upon by the plaintiff is not applicable to the facts before this court as the facts and circumstances there were different. There, the D shares were pledged by an innocent third party who had no connection with the illegal transaction;

(v) the plaintiff's submission that they have not received any consideration for the 500,000 shares is misleading. The evidence clearly showed that the plaintiff received RM8 million for the shares;

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(vi) the share sale transaction is totally separable and distinct from the loan granted by the company to the first defendant. Even if the court finds that it is tainted due to the illegality of the loan transaction, which the defendant denies, on the authority of the Privy Council decision in *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90. Good title had indeed F passed to the second defendant. The defendant also relies on the decision in *Daniel D William v. Luhat Wan & Ors & Another Case (2)* [1990] 1 CLJ 472; [1990] 1 CLJ (Rep) 762; [1990] 2 MLJ 48;

(vii) here, the shares were already registered in the second defendant's name. She was never a party to the financial assistance that G contravened s. 67(1). See *Tinsley v. Milligan* [1993] 3 All ER 65 and *Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors* [2000] 3 CLJ 341; [2000] 3 MLJ 95;

(viii) the plaintiff's submission that he cannot be held complicit to the commission of the illegal act as he could not remember and was not H sure of its contents is caught by the *maxim ignorantia juris non excusat* or *ignorantia legis neminem excusat*;

(ix) section 66 of the Contracts Act 1950 relied upon by the plaintiff only applies to contracting parties and not third parties or strangers. Here I the share sale transaction was between the plaintiff and the second defendant. Hence, it has no applicability insofar as the first defendant is concerned; and

(x) in the event this court makes an order that the share sale transaction is void and orders for the 500,000 shares to be returned to the plaintiff, the court should also order the RM8 million received by the plaintiff to be returned.

The Law

[35] Section 67(1) of the Companies Act provides as follows:

> Except as is otherwise expressly provided by this Act no **company shall give, whether directly or indirectly and whether by means of a loan**, guarantee or the provision of security or otherwise, **any financial assistance for the purpose of or in connection with the purchase** or subscription made or to be made **by any person** of or **for any shares in the company** or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares. (emphasis added)

[36] The prohibition laid down in s. 67 above, involves two ingredients. Firstly, there must be financial assistance given by the company. The financial assistance may be given "directly or indirectly" and includes a loan, guarantee, pledged for security. Secondly, the financial assistance given is 'for the purpose of or in connection with' the purchase of the company's shares.

[37] For purposes of determining whether or not there was any financial assistance given in contravention of s. 67, the courts have more often than not, looked at the commercial aspects of each transaction separately instead of taking a narrow stand on the subject matter concerned. See: *Charterhouse Investment Trust Ltd v. Tempest Diesels Ltd* [1986] BCLC 1.

[38] The following have been held amounting to giving financial assistance in contravention to the prohibition in s. 67:

(i) using a loan from a bank secured by the hotel's land to purchase shares in the company that owns the hotel: *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356;

(ii) a transfer of shares in a company which owned development land to a developer in return which the developer would build houses on the land and transfer some of the houses constructed to the shareholders: *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Ors* [1990] 1 LNS 172; [1990] 1 MLJ 485; [1990] 1 MSCLC 90;

(iii) the depletion of company assets by way of transfer of shares involving the transfer of a lease and a lease back agreement: *Simmah Timber Industries Sdn Bhd v. David Low See Keat & Ors* [1999] 1 LNS 14; [1999] 5 MLJ 421; and

(iv) where a company purchased property from a person at an inflated price with the sole purpose of enabling that person to purchase the company's shares: *Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, Buckley LJ, speaking for the Court of Appeal said at p. 403:

> It was an exceptional and artificial transaction and not in any sense an ordinary commercial transaction entered for its own sake in the commercial interests of Belmont. It was part of a comparatively complex scheme for enabling Mr. Grosscurth and his associates to acquire Belmont at no cash cost to themselves, the purchase being found not from their own funds or by the realisation of any assets of theirs (for Maximum continued to be part of their group of companies) but out of Belmont's own resources.

[39] The underlying principle governing this prohibition is that those who purchase shares in a company should do so from their own resource and should not in any way make use of the company's resources. To do so may cause assets of the company to dissipate to the detriment of the company's financial position and prejudicial to the interests of the shareholders.

[40] Notwithstanding the wide scope of the prohibition, there are three statutory exceptions namely:

(a) Section 67(2)(a): to the shares of a company whose ordinary business is money lending;

(b) Section 67(2)(b): whereby financial assistance is provided by a company for shares to be held by trustees for the benefit of employees; and

(c) Section 67(2)(c): where financial assistance is given by a company to its employees to purchase its fully-paid shares.

Effect Of Breach Of Financial Assistance Prohibition

[41] A breach of the prohibition invites both criminal and civil consequences.

[42] Under s. 67(3) each officer who is in default is liable to a fine of up to RM100,000 or five years imprisonment or both.

[43] Insofar as civil consequence is concerned it is regulated by sub-s. (6) of s. 67. Subsection (6) was amended by the Companies (Amendment) (No 2) Act 1992 which came into effect on 10 September 1992. Under the original version, 'the company' was not prevented from recovering the amount of any loan made in breach of s. 67.

[44] Subsection (6) of s. 67 was amended by the inserting the words 'or any person' after the words 'the company'. The amended sub-s. (6) reads as follows:

> Nothing in this section shall operate to prevent the company [or any person] from recovering the amount of any loan made in connection of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[45] In *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* (*supra*), the Supreme Court held that a transaction made in breach of the financial assistance prohibition would be null and void under s. 24 of the Contracts Act 1950. It was further held that the words 'the company' referred to the company itself which had provided the financial assistance and the meaning of the words did not included a third party – the lender in that case. The Supreme Court in *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua & Or* (*supra*), also held that an agreement which contravenes s. 67 is void and unenforceable under s. 24 of the Contracts Act 1950.

[46] In *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81; [1999]3 AMR 3161 (FC), the Federal Court departed from the Supreme Court's approach in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* (*supra*).

[47] The brief facts in *Lori* are as follows:

> Lori (M) Bhd ('Lori') had charged land belonging to it by way of security in favour of Arab Malaysia Finance Berhad ('AMFB') for a loan. Lori was originally owned by Majlis Amanah Rakyat ('MARA'). MARA had appointed Technivest Sdn Bhd to manage Lori. Later MARA offered to sell its shares in Lori to Technivest. AMFB required a charge of the land owned by Lori as security for the loan facility. The charge and loan facility agreement were executed on 11 October 1990. Lori defaulted in the repayment of the loan and AMFB applied to the High Court to enforce the charge by way of an order for sale. At the High Court, Lori contended that the charge was unenforceable as it contravened s. 67 of the CA 1965. Lori's contention was rejected and the order for sale was granted in favour of AMFB. Lori appealed to the Federal Court on the ground that the High Court erred in holding that the loan facility arrangements did not contravene the prohibition under s. 67 of the CA. The Federal Court dismissed the appealed.

[48] In dismissing the appeal, the Federal Court in *Lori*, took the view that *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* (*supra*), was decide *per incuriam* because the Supreme Court failed to actually construe the words 'for which it become liable' in sub-s. (6). There was too much emphasis given on the provisions of s. 24 of the Contracts Act 1950 and held that because the bank had knowledge of the illegality and the nature of the transaction at the material time, the bank's claim failed. The Federal Court took the view that sub-s. (6) creates an important exception to s. 24 of the Contracts Act 1950 by allowing recovery under illegal contract, thereby

A excluding the operation of s. 24. Subsection (6) was enacted for the protection of the company's funds and the interests of shareholders as well as creditors and the general public. It went on to hold that the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* had been unduly swayed by certain English cases as the relevant legislation in which B they were decided did not have an equivalent sub-s. (6) saving provision.

Court's Analysis

[49] Based on my reading of the authorities furnished and the facts before me, I am of the view that the share sale transaction before me is valid and enforceable despite there being a contravention of s. 67 of the Companies Act C 1965 by both the plaintiff and the first defendant.

[50] To my mind, the share sale transaction is separate and distinct from the loan transaction of RM8 million to the first defendant. It is the loan transaction which is prohibited by virtue of s. 67(1) of the CA and not the D acquisition of the shares in the company.

[51] In holding so, I am adopting the approach of the Federal Court in the case of *The Co-Operative Central Bank Limited (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313 and the judgment of Augustine Paul J (as he then was) in *Datuk Tan Leng Teck v. Sarjana Sdn* E *Bhd & Ors* (*supra*) which was dully approved by the Federal Court in *Lori* (*supra*) as well as the decision in *Fujasa* (*supra*).

[52] The fact that there the plaintiff and the first defendant are the only shareholders in the company and that the share sale transaction was entered into for the future of the company is similar to that in the case of *Datuk Tan* F *Leng Teck v. Sarjana Sdn Bhd & Ors* (*supra*) and re-produced below is the relevant part of the judgment *in extenso*:

At p. 351 para. F:

> Be that as it may, the fact that the first defendant provided financial G assistance to the second defendant to acquire the shares will not amount to financial assistance within the meaning of s. 67(1) of the Act if the transaction was a *bona fide* commercial transaction entered into in good faith. The available evidence shows that the allotment of the 1m shares was in line with the first defendant's programme for expansion. However, that does not mean that the allotment of the shares to the second H defendant at no cost is a *bona fide* commercial transaction. As a matter of fact, the subscription of shares in the first defendant by the second defendant was not a commercial transaction as far as the first was concerned. It was not a transaction whereby the first defendant acquired anything which it genuinely needed for its own purpose. On the other hand, it was a transaction which facilitated the second defendant's I acquisition of control of the first defendant for its own purpose. It was

A certainly not a transaction in the ordinary course of the first defendant's business. As Buckley LJ said in *Belmont Finance Corp v. Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 in somewhat similar circumstances, at p 403 ...

... I therefore hold that the first defendant has provided financial assistance to the second defendant for the subscription of the 1m shares B within the meaning of s. 67(1) of the Act. The ensuing matter for deliberation is the legal effect of an agreement made in contravention of s 67(1) ...

At p. 355 para. F (to start from p. 354 para. E):

There is much to be said for the view that once a statutory penalty has C been provided for an offence, the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished (see my judgment in *Jackson v. Harrison* (1978) 138 CLR 438 at p 452 ...

At p. 358 para. D: D

The transparent ratio to be discerned from the cases that I have anatomised is that a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 of the Contract Act 1950 cannot E apply to such a contract for the obvious reason that the statute itself has saved the contract which was otherwise forbidden. As Gibbs ACJ observed in the passage from the *Yango* decision, which I have reproduced in an earlier part of the judgment, it is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 of the Act is one of the F instances of such rare exercise of legislative power. I therefore hold that as s. 67(3) prescribes penalties for a breach of s. 67(1) and s. 67(6) provides remedies for the breach and, furthermore, having regard to the context and purpose of s. 67(1), any transaction entered into in breach of the section is valid and enforceable. In the circumstances the agreement in this case does not become void and unenforceable. The corollary I that G the transaction entered into by the parties is valid and, in consequence thereof, the first defendant may enforce payment arising from the allotment of the shares for which it gave financial assistance ...

Notwithstanding what I have said thus far, I must point out that the declarations sought by the plaintiff are to render only the allotment of H shares to the second defendant void. My immediate response is that s. 67(1) only prohibits the giving of financial assistance for the acquisition of shares and not the acquisition of the shares itself which is perfectly lawful unless there is evidence, of which there is none, that is was illegally allotted by, for example, not following the proper procedure. The

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A allotment of shares to the second defendant is therefore not hit by s. 67(1) and is thereby not invalidated in any way (see *Spink (Bournemouth) Ltd v. Spink* [1936] 1 All ER 597 and *EH Dey Pty Ltd (In liquidation) v. Dey* [1966] VR 464) without the need to invoke s. 67(6). This, however, is subject to an important qualification. *As the allotment of shares in this case is connected with the financial assistance provided by the first defendant, the activation of s. 67(1)* B *depends on whether both the transactions can be severed. If they can, then the transaction relating to the acquisition of shares does not come with s. 67(1) (see Carney v. Herbert [1985] AC 301). It is not necessary for me to decide whether the two transactions can be severed for two reasons: firstly, it was not argued before me; and secondly, it is not relevant for obvious reasons as the result would be the same whether the transactions are severable or not. If they are severable, the allotment of* C *shares is valid as it is not prohibited by s. 67(1). If they are not severable the composite transaction will be governed by s. 67(6) and will still be valid*. (emphasis added)

[53] As to the loan of RM8 million to the first defendant, it is up to the company as to what it decides to do as s. 67(6) of the Companies Act does D allow so. The plaintiff who is no longer a director or shareholder of the company has no *locus standi* to initiate any action on it. Furthermore, the plaintiff had duly submitted that since the company has declared a dividend of RM8 million, there is no loss to the company arising from the transaction. I am of the view that this is the mischief intended to be proscribed by s. 67. E From the company entity's point of view, the net effect to issuing a loan for RM8 million to its shareholders to be set-off subsequently by a declaration of dividends, or to immediately declare and issue dividends RM8 million has little difference. In fact, rather than be entangled in a shareholders dispute leading to its ultimate demise as has oft happened, the implementation of the F transaction between its only (two) shareholders has indeed allowed a smooth transition and thus continuity of the operation of the company.

[54] In the event I am wrong in holding that the share sale transaction is valid and enforceable, I am of the view that the plaintiff's cause of action in asking this court to declare the share sale transaction void, is akin to asking G this court to enforce a transaction, founded on an illegal act due to the fact that the 500,000 shares purchased from the plaintiff was paid *via* monies obtained from an illegal loan transaction.

[55] It is trite law that a cause of action which is founded on an illegal act cannot succeed (*Chettiar v. Chettiar* [1962] 1 All ER 494 at p. 498).

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[56] Similarly, in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 it was held following Lindley LJ in *Scott v. Brown, Doering, McNab & Co* [1892] 2 QB 724:

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No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

[57] I therefore dismiss the plaintiff's claim with cost of RM30,000.

[58] The defendants' counterclaim is dismissed with no order as to costs.